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Public Prosecutor v Puvaneswaran a/l Chellan

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO BA-45B-24–06 OF 2019
NURULHUDA NUR'AINI JC
25 OCTOBER 2021

C *Criminal Law — Offences — Murder — Accused charged with offence of murder under s 302 of Penal Code — Whether there was break in chain of evidence — Whether photographs were admissible — Whether identity of deceased was proven — Whether fatal injuries leading to deceased's death caused by accused — Whether there was motive to kill — Whether SP9 was accomplice* D *— Whether SP9 was too intoxicated — Whether injuries were one under limb (c) of s 300 of Penal Code — Whether prosecution failed to charge accomplice — Whether defence raised reasonable doubt — Penal Code ss 300 & 302*

E The accused was charged with an offence of murder under s 302 of the Penal Code. SP3 was driving a motor lorry on 24 July 2018 at about 6am when he saw an object that looked like a human body lying on the roadside. SP3 made a call to the police and went to the police station to lodge a report a day later as he was working on that day. SP2 was instructed by the investigating officer ('SP11') to take photos of the crime scene and all the photos images were F transferred into a CD. The photos were tendered as ID9, ID11 and the CD P10. A motorcycle and a helmet were also found at the scene. The pathologist ('SP5') found multiple injuries on the body of the deceased. The cause of death was multiple slash wounds to the head. The prosecution called SP9 who said he knew the deceased as the deceased was a distant relative. SP9 and the accused G were close friends as the accused frequented SP9's house in Sg Besi often. SP9 met with the deceased as the deceased had uploaded embarrassing posting of SP9 and the accused's family on his FB. SP9 shared with the accused what the deceased did. On 23 July 2018, SP9 and the deceased had spent the night drinking. It started in SP9's Sg Besi neighbourhood then they proceeded to H Ampang where the accused joint them before the trip ended in Hulu Langat. SP9 went to these locations with the deceased on the deceased's motorcycle. The accused came on his own. SP9 was angry with the deceased for saying bad about SP9's mother that resulted in SP9 hitting the deceased's head with an ice breaker. SP9 said the accused had used a knife to slash the deceased on the I deceased's back and face. Both SP9 and the accused returned to the accused's house in Ampang and burnt the clothing worn by them during the incident. The weapons used were disposed at a nearby damp on the way back.

Held, convicting the accused and sentencing to death by hanging:

(1) There was no doubt that the exhibits that were collected at the crime scene and those gathered by SP5, were sent to the chemist. With this finding, there was no break in the chain of exhibits as alleged by the defence (see paras 54–55).

(2) The court was not functus officio as the real determination was whether the prosecution had proven a prima facie case or not. The court was still within the parameters to adjudicate the consequential issues arising before making its final determination at the close of the prosecution case. The conversion of the photographs of the crime scene ie ID9 and ID11 to 'P' was done on the basis that SP11 was present at the scene with SP2 and the forensic officer ('SP10'). The omission by the prosecution for the exhibits that were gathered and handed over to be identified by SP10 in court did not render the identity of the exhibits, questioned, or credibility challenged as SP11 had identified and acknowledged receipt of them. The photographs were admissible and they were to be marked as 'P' (see paras 68, 70–71 & 73).

(3) Despite the fact that the finger print report was not tendered, there were evidences that could be gathered which proves the identity of the deceased. SP9 acknowledged that the photo shown to him by the prosecution was the deceased's motorcycle. As SP9 took a ride on this motorcycle from Sg Besi to Ampang then to that spot in Hulu Langat with the deceased thus he would be very familiar with the motorcycle. Section 21 of the Evidence Act 1950 permitted such prove by way of inferences arising from positive statement or in short 'admission'. The identity of the deceased was proven by the fact that SP9 travelled with the deceased on the deceased's motorcycle (see paras 84 & 87–88).

(4) The finding of DNA of the accused on the cigarette butt retrieved at the crime scene suggested the presence of the accused there thus supported SP5's finding that more than one suspect caused the injuries on the deceased. The accused only joined them in Ampang without the deceased being aware the accused had the knife with him but all three eventually headed to the same spot in Hulu Langat. The blood samples of other suspects were also collected and sent to the chemist for comparison, but none matched with the samples on the exhibits taken at the crime scene (see para 91).

(5) The accused frequented SP9's house every day to look for the deceased. The only reason for the deceased to do so must arose due to the intervention by SP9 and the accused, causing the deceased to be antagonised (see para 93).

(6) SP9 was an accomplice as SP9 himself would have the same motive to kill the deceased and the fact that SP9 was also armed and had played a role in causing a certain degree of injuries on the deceased. SP9 not only

assisted in concealing the crime but had participated in procuring the deceased to the scene and facilitating the deceased to be drunk by making available the beer, thus making it an easy task for SP9 himself and the accused to cause the injuries on the deceased. The accomplice SP9's evidence was corroborated. SP9 had always been consistent and maintained the version of his story. Therefore, SP9 was a credible and reliable witness (see paras 94–95 & 97–98).

(7) SP9 was not too intoxicated so as not to be able to know what he did and what had happened at Hulu Langat and back to the accused's house in Ampang. SP9 testified that the weapons were disposed of at a damp on their way back to the accused's house in Ampang and clothes worn were disposed of by burning. SP9 was not too intoxicated so as not to be aware what had happened on that night (see paras 104–105).

(8) SP5 had used the word 'slash' to show the difference in relation to the injuries found on the deceased to be caused by a sharp-edged heavy and rather long object whereas 'stab' wounds to describe injuries caused by icebreaker. The left side of the brain and inferior aspect of the frontal lobe were crushed. The only conclusion was that with that amount of force against that part of the body, death would be the ultimate result. The prosecution had proven a prima facie case of murder against the accused under limb (c) of s 300 of the Penal Code (see paras 110–111).

(9) The decision to charge or not to charge SP9 was entirely within the discretion of the public prosecutor. The public prosecutor had in no way made any attempt to treat SP9 as hostile or to cross-examine SP9 in any way. The public prosecutor would have decided that no charge was to be made against SP9. Furthermore, the charge against the accused could stand alone as it was not a case where it could not be ascertained who between the two people (the accused and SP9) who had caused the fatal injuries. Hence, the prosecution had successfully proven a prima facie case and the accused was called to enter his defence (see paras 114, 116 & 120–121).

(10) The important fact of the phone call between the accused's father ('SD2') and accused and SD2 saw the accused at home, was never put to SP11. This material omission left the court with no option but to conclude that the call never happened. With the alibi evidence expunged, the only defence of the accused was a denial that he never committed the murder. This did not answer the evidence of SP5 which found the injuries on the deceased were of different sizes that led him to conclude the possibility that more than one weapon being used and the deceased being attacked by more than one assailant. With SP9 who the prosecution never disputed to have also injured the deceased and hence an accomplice but needed to be called as prosecution witness as he played no role in causing the fatal injuries that led to the death of the deceased, the elimination

process having been exercised by the court left only the accused at the scene. More so the accused's DNA on a cigarette butt was found at the scene but no explanation was given by the accused in his evidence. Therefore, the prosecution had succeeded in proving a case beyond reasonable doubt that the accused had murdered the victim as per the charge proffered against the accused with the defence having failed to raise a reasonable doubt on the evidence as adduced and found by the court (see paras 144–147).

[Bahasa Malaysia summary

Tertuduh didakwa melakukan kesalahan membunuh di bawah s 302 Kanun Keseksaan. SP3 sedang memandu lori pada 24 Julai 2018 kira-kira jam 6 pagi apabila ternampak objek yang kelihatan seperti mayat manusia terbaring di tepi jalan. SP3 membuat panggilan kepada polis dan pergi ke balai polis untuk membuat laporan sehari kemudian kerana dia bekerja pada hari tersebut. SP2 telah diarahkan oleh pegawai penyiasat ('SP11') untuk mengambil gambar tempat kejadian dan semua gambar tersebut dipindahkan ke dalam CD. Gambar-gambar tersebut telah ditender sebagai ID9, ID11 dan CD P10. Sebuah motosikal dan topi keledar turut ditemui di tempat kejadian. Pakar patologi ('SP5') menemui pelbagai kecederaan pada badan si mati. Punca kematian adalah beberapa kesan tetakan di kepala. Pihak pendakwaan menghubungi SP9 yang memberitahu dia mengenali si mati memandangkan si mati adalah saudara jauh. SP9 dan tertuduh merupakan kawan rapat kerana tertuduh sering ke rumah SP9 di Sg Besi. SP9 bertemu dengan si mati kerana si mati telah memuat naik kenyataan memalukan SP9 dan keluarga tertuduh di FB miliknya. SP9 berkongsi dengan tertuduh apa yang dilakukan oleh si mati. Pada 23 Julai 2018, SP9 dan si mati telah meluangkan masa dengan meminum minuman keras. Ia bermula di kejiranan Sg Besi SP9 kemudian mereka terus ke Ampang di mana tertuduh bersama mereka sebelum perjalanan berakhir di Hulu Langat. SP9 pergi ke lokasi-lokasi tersebut bersama si mati menaiki motosikal si mati. Tertuduh datang sendiri. SP9 berang dengan si mati kerana bercakap buruk tentang ibu SP9 sehingga menyebabkan SP9 memukul kepala arwah dengan alat pemecah ais. SP9 berkata, tertuduh menggunakan pisau untuk mengelar bahagian belakang dan muka si mati. Kedua-dua SP9 dan tertuduh pulang ke rumah tertuduh di Ampang dan membakar pakaian yang dipakai mereka semasa kejadian. Senjata yang digunakan telah dilupuskan di tempat pembuangan berhampiran semasa dalam perjalanan pulang.

Diputuskan, mensabitkan tertuduh dan menjatuhkan hukuman gantung sampai mati:

(1) Tidak dinafikan bahawa ekshibit yang diambil di tempat kejadian dan yang diambil oleh SP5, telah dihantar kepada ahli kimia. Dengan penemuan ini, tiada pemutusan dalam rantaian ekshibit seperti yang didakwa oleh pihak pembelaan (lihat perenggan 54–55).

(2) Mahkamah tidak functus officio kerana penentuan sebenar adalah sama ada pihak pendakwaan telah membuktikan kes prima facie atau tidak. Mahkamah masih dalam parameter untuk mengadili isu berbangkit sebelum membuat penentuan muktamad pada penutupan kes pendakwaan. Penukaran gambar-gambar tempat kejadian iaitu ID9 dan ID11 kepada 'P' dilakukan atas dasar SP11 hadir di tempat kejadian bersama SP2 dan pegawai forensik ('SP10'). Peninggalan pihak pendakwaan terhadap ekshibit yang diambil dan diserahkan untuk dikenal pasti oleh SP10 di mahkamah tidak menyebabkan identiti eksibit, dipersoalkan, atau kredibiliti dicabar kerana SP11 telah mengenal pasti dan mengakui penerimaannya. Gambar-gambar itu boleh diterima dan mereka perlu ditanda sebagai 'P' (lihat perenggan 68, 70–71 & 73).

(3) Walaupun laporan cap jari tidak dikemukakan, terdapat bukti yang boleh diambil yang membuktikan identiti si mati. SP9 mengakui gambar yang ditunjukkan oleh pihak pendakwaan kepadanya adalah motosikal si mati. Memandangkan SP9 menunggang motosikal ini dari Sg Besi ke Ampang kemudian ke tempat di Hulu Langat bersama si mati, maka dia amat mengenali motosikal tersebut. Seksyen 21 Akta Keterangan 1950 membenarkan pembuktian sedemikian dengan cara inferens yang timbul daripada pernyataan positif atau ringkasnya 'pengakuan'. Identiti si mati dibuktikan dengan fakta bahawa SP9 bergerak bersama si mati menaiki motosikal si mati (lihat perenggan 84 & 87–88).

(4) Penemuan DNA tertuduh pada puntung rokok yang diambil di tempat kejadian menunjukkan kehadiran tertuduh di situ sekali gus menyokong dapatan SP5 bahawa lebih daripada seorang suspek menyebabkan kecederaan kepada si mati. Tertuduh hanya bersama mereka di Ampang tanpa si mati menyedari tertuduh membawa pisau tetapi ketiga-tiga mereka akhirnya menuju ke tempat yang sama di Hulu Langat. Sampel darah suspek lain juga telah diambil dan dihantar kepada ahli kimia untuk perbandingan, tetapi tidak ada yang sepadan dengan sampel pada ekshibit yang diambil di tempat kejadian (lihat perenggan 91).

(5) Tertuduh sering ke rumah SP9 setiap hari untuk mencari si mati. Satu-satunya sebab si mati berbuat demikian mesti timbul kerana campur tangan oleh SP9 dan tertuduh, menyebabkan si mati bermusuhan (lihat perenggan 93).

(6) SP9 adalah rakan sejenayah kerana SP9 sendiri mempunyai motif yang sama untuk membunuh si mati dan fakta bahawa SP9 juga bersenjata dan telah memainkan peranan menyebabkan kecederaan tertentu ke atas si mati. SP9 bukan sahaja membantu menyembunyikan jenayah tetapi turut mengambil bahagian dalam mendapatkan si mati ke tempat kejadian dan memudahkan si mati mabuk dengan menyediakan bir, sekali gus memudahkan SP9 sendiri dan tertuduh menyebabkan

kecederaan kepada si mati. Keterangan rakan sejenayah SP9 telah disahkan. SP9 sentiasa konsisten dan mengekalkan versi ceritanya. Oleh itu, SP9 adalah saksi yang kredibel dan boleh dipercayai (lihat perenggan 94, 95 & 97–98).

(7) SP9 tidak terlalu mabuk sehingga tidak dapat mengetahui apa yang dilakukannya dan apa yang berlaku di Hulu Langat dan pulang ke rumah tertuduh di Ampang. SP9 memberi keterangan bahawa senjata itu dilupuskan di tempat pembuangan dalam perjalanan pulang ke rumah tertuduh di Ampang dan pakaian yang dipakai telah dilupuskan dengan dibakar. SP9 tidak terlalu mabuk sehingga tidak menyedari apa yang berlaku pada malam tersebut (lihat perenggan 104–105).

(8) SP5 telah menggunakan perkataan 'tetak' untuk menunjukkan perbezaan berhubung kecederaan yang ditemui pada si mati disebabkan oleh objek berat dan agak panjang bermata tajam manakala luka 'tikam' untuk menggambarkan kecederaan yang disebabkan oleh pemecah ais. Bahagian kiri otak dan aspek *inferior lobus frontal* adalah hancur. Satu-satunya kesimpulan adalah bahawa dengan jumlah daya terhadap bahagian badan itu akan mengakibatkan kematian. Pihak pendakwaan telah membuktikan kes pembunuhan prima facie terhadap tertuduh di bawah bahagian (c) s 300 Kanun Keseksaan (lihat perenggan 110–111).

(9) Keputusan untuk mendakwa atau tidak terhadap SP9 adalah sepenuhnya mengikut budi bicara pihak pendakwa raya. Pendakwa raya sama sekali tidak membuat sebarang percubaan untuk menganggap SP9 sebagai belot atau menyoal balas SP9 dalam apa jua cara. Pendakwa raya yang akan memutuskan bahawa tiada pertuduhan akan dibuat terhadap SP9. Tambahan pula, pertuduhan terhadap tertuduh boleh berdiri sendiri kerana ia bukan kes di mana tidak dapat dipastikan siapa antara dua orang (tertuduh dan SP9) yang menyebabkan kecederaan maut. Oleh itu, pihak pendakwaan telah berjaya membuktikan kes prima facie dan tertuduh dipanggil membela diri (lihat perenggan 114, 116 & 120–121).

(10) Fakta penting mengenai panggilan telefon antara bapa tertuduh ('SD2') dan tertuduh dan SD2 melihat tertuduh di rumah, tidak pernah dikemukakan kepada SP11. Peninggalan material ini menyebabkan mahkamah tiada pilihan selain membuat kesimpulan bahawa panggilan itu tidak pernah berlaku. Dengan keterangan alibi dihapuskan, satu-satunya pembelaan tertuduh ialah penafian bahawa dia tidak pernah melakukan pembunuhan itu. Ini tidak menjawab keterangan SP5 yang mendapati kecederaan pada si mati berbeza saiz menyebabkan dia membuat kesimpulan kemungkinan lebih daripada satu senjata digunakan dan si mati diserang lebih daripada seorang penyerang. Dengan SP9 yang pihak pendakwaan tidak pernah mempertikaikan turut mencederakan si mati dan seterusnya bersubahat tetapi perlu dipanggil sebagai saksi pendakwaan kerana dia tidak memainkan

peranan dalam menyebabkan kecederaan maut yang membawa kepada kematian si mati, proses penyingkiran telah dijalankan oleh mahkamah hanya tinggal tertuduh di tempat kejadian. Lebih-lebih lagi DNA tertuduh pada puntung rokok ditemui di tempat kejadian tetapi tiada penjelasan diberikan oleh tertuduh dalam keterangannya. Oleh itu, pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan munasabah bahawa tertuduh telah membunuh mangsa seperti pertuduhan yang dikemukakan terhadap tertuduh dengan pihak pembelaan telah gagal menimbulkan keraguan munasabah terhadap keterangan yang dikemukakan dan didapati oleh mahkamah (lihat perenggan 144–147).]

Cases referred to

Adiswaran a/l Tharumaputrintar v PP and other appeals [2014] 3 MLJ 228, FC (refd)
Borhan bin Hj Daud & Ors v Abd Malek bin Hussin [2010] 6 MLJ 329, CA (refd)
Chin Wai Leong & Ors v PP and another appeals [2019] MLJU 1962, CA (refd)
Datuk Mohd Zaid bin Ibrahim v Peguam Negara Malaysia [2017] 9 MLJ 502, HC (refd)
Dublin Edward Tinggi v PP [2018] 1 LNS 197, HC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)
Fazal Din v PP [1949] 1 MLJ 123 (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389, FC (folld)
Hanif bin Mohamad Ali v Pendakwa Raya [2016] MLJU 1763, CA (refd)
Harcharan Singh & Anor v PP [2005] 1 MLJ 593, CA (refd)
Harcharan Singh a/l Piara Singh v PP [2011] 6 MLJ 145, FC (refd)
Husin bin Ismail v Pendakwa Raya [2000] MLJU 392, HC (refd)
Mohd Khayry bin Ismail v PP [2014] 4 MLJ 317, CA (refd)
Mohd Naim bin Ramli lwn Pendakwa Raya [2017] MLJU 886, CA (refd)
Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114, CA (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379, FC (refd)
Pendakwa Raya lwn Nasrun Effendi [2008] 4 MLJ 272, HC (refd)
PP v Harcharan Singh a/l Piara Singh & Anor (Criminal Appeal No 02–22 of 2004(B) (unreported), FC (refd)
PP v Mohd Azam bin Basiron & Anor [2011] 3 MLJ 741; [2010] 9 CLJ 1, CA (refd)
R v Roach [1985] PEIJ No 73 (refd)
Teay Wah Cheong v PP [1964] 1 MLJ 21 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 113, 402A, 402B
Evidence Act 1950 ss 21, 90A
Penal Code ss 34, 300(c), 302, 304, 323, 326
Rules of the Federal Court r 137

Sheelan a/l Arjunan (Sheelan Arjunan) for the accused.
Mohammed Heikal Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Nurulhuda Nur'aini JC:

BACKGROUND

[1] The accused is charged with an offence of murder under s 302 of the Penal Code. The said charge reads as follows:

> Bahawa kamu pada 24/7/2018 antara jam lebih kurang 12.30 pagi hingga jam lebih kurang 6.05 pagi bertempat di Jalan Kuala Klawang, di dalam Daerah Hulu Langat di dalam Negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Ganesh a/l Govendaraju (No KP 890504–14–6749) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The prosecution had called 11 witnesses as follows:

(a) RF Amat Salino bin Amat Kasan (SP1);
(b) D/Kpl Mazlan bin Awang Lah (SP2);
(c) Haszeman bin Atan (SP3);
(d) ASP Ismail Ahmad (SP4);
(e) Dr Emizam bin Mahamadon (SP5);
(f) Kpl Misri bin Kardi (SP6);
(g) Sjn Ilham bin Hitam (SP7);
(h) Jayasilan a/l Sinnathurai (SP8);
(i) Geva Ratanam a/l Arunachalan (SP9);
(j) D/SM Tamilselvan a/l Munusamy (SP10); and
(k) ASP Mohd Radzee bin Jamudi (SP11).

[3] The opening statement by the prosecution marked as exh P2 states that the prosecution would rely on s 300 limb (c) to prove its case. The prosecution also tendered the list of witnesses that will be called by the DPP and marked as P4. This list is the shortlisted witnesses from the longer list P3 which contained witnesses in P4.

[4] At the close of the prosecution case, the witnesses offered to the defence remained as in P4 being witness Nos 8, 10 and 11. Witness No 6 was not called

to testify and not offered perhaps may have been overlooked by the prosecution inadvertently.

FACTS ADDUCED BY THE PROSECUTION AND THE DEDUCTION ARISING FROM CROSS-EXAMINATION

[5] SP3 Haszeman who worked as a lorry driver testified that on 24 July 2018, whilst he was driving a motor lorry at about 6am on Jalan Hulu Langat, he saw an object that looked like a human body lying on the roadside with the upper body at the inner side of the road and its leg almost in the open out on the road.

[6] He came down from his motor lorry and went to check. Upon stumbling with the body which appeared to him as already dead as it was not moving and also due to the dark surrounding of the road with no road lights, SP3 who was terrified immediately left the scene.

[7] SP3 however, managed to make a call to the police station using SP3's phone and the call was picked up by Kpl Salino SP1 who took down SP3's info. SP3 said he was subsequently asked by the police to come to the police station to lodge a report upon confirmation of the discovery of the body by the police MPV team. SP3 did a day later, as SP3 was working on that day.

[8] SP1 Kpl Salino said he received the call at about 6.05am in the morning informing of the discovery of a human body. The caller's name and handphone number were taken and noted in the police report lodged by SP1 as first information report (FIR) P8 being Semenyih Report 4532/18. The details taken of the caller to be Haszeman SP3.

[9] SP1 then informed SP11 (IO) ASP Radzee officer on duty who then instructed police MPV to head to the location to verify the information given and to inspect the body, if found. SP1 also said that he was given the instruction by SP11 to notify SP3 to lodge a police report of SP3's discovery.

[10] SP1's police report P8 appears to state that SP3 came to the police station when in fact, SP1's police report was based on SP3's phone call, a slight discrepancy but did not affect the prosecution's evidence as SP3 did present himself at the police station later and met with SP11 ASP Radzee for statement taking.

[11] SP2 D/Kpl Mazlan by way of his witness statement PSP2 said on 24 July 2018 he was instructed by the IO SP11 to take photos of the crime scene at Jln Kuala Klawang Semenyih-Kajang Selangor in connection with Semenyih Report 4532/18. SP2 took 40 photographs. On 25 July 2018, SP2

was further instructed to take the post mortem photos at the forensic unit, Serdang Hospital. SP2 took 93 photos.

[12] SP2's witness statement said he had used a digital camera canon 750D and a Sandisk Ultra memory card which was functioning state 'keadaan sempurna'. Photos were printed using a Noritsu machine. All the photos images were transferred 'masukkan' into a CD using the Noritsu machine.

[13] The prosecution faced some obstacles in tendering the photos as the query by this court and the defence that the crime scene photos were only 38 as opposed to 40 as stated by SP2. SP2 said the it was complete when he handed it over to the IO via the CD. The IO SP11's evidence unfortunately, was silent about this.

[14] The photos were tendered as ID9(1)–(38), ID11(1)–(93) and the CD P10. The tendering and marking of photos as exhibit in the form of 'ID' were subject to SP2 to be recalled to tender the memory card of the camera, this memory card being the primary evidence of the photos. This court in ensuring a fair trial, had indicated to the prosecution to lead more questions pertaining to the memory card as the witness statement was rather shallow.

[15] The prosecution had some difficulties in relation to procedural compliance of the evidentiary burden to admit photographs taken by digital camera as although the CD that was burned was tendered, the primary evidence of a digital camera is the memory card that is the SC Disk as stated in PSP2.

[16] SP2 when recalled, said he had deleted the photos in the memory card as the memory card contained a lot of photos of exhibits. However, there was no justifiable explanation coming from SP2 as to why the images in this case as opposed to images of other cases, needed to be deleted from the memory card.

[17] Defence counsel objected to the memory card being admitted as exh 'P'. The prosecution having shown this court the said memory card, it was marked as 'ID13' (the marking of the memory card as ID13 was done by court since it was referred to as the primary evidence in this case). The prosecution then made a request for the memory card to be returned to SP2 but this court had refused the said application since the prosecution had not given any basis for the return. The IO SP11 was not asked to address the 40 photos that were made available, the deletion of the images in the memory card nor the purpose of its return, as such nothing further added to SP2's evidence on this crucial point.

[18] The story carried by the photos tendered by the prosecution, as

suggested by the defence seemed to tell a story that the accused Puvaneswaran appeared as suspect in this murder charge based on the fact that his DNA was found on a cigarette butt recovered at the crime scene. The photo taken of the said cigarette butt is in ID11(10). The defence suggested that the said cigarette butt was found about a distance of 100 metres away from where the body was recovered which was agreed by SP2. Furthermore, the accused as contended by the defence, was smoking and sharing cigarette elsewhere with SP9. This important suggestion will be dealt further in this judgment.

[19] On 6 September 2018, SP4 ASP Ismail Ahmad arrested the accused at IPD Kajang. Arrest report Kajang Report 33073/18 tendered as P14. A handphone was also seized from the accused and a search list prepared.

[20] SP4 testified that he arrested the accused at the police station compound. From his evidence, there was a struggle before the accused's handphone was confiscated. A search list was prepared and arrest report was lodged by SP4. The search list was not referred to SP4 for him to identify, but was shown to the IO later, to be tendered.

[21] The cross-examination by the defence and subsequently agreed by SP4 was that the arrest which was said to be affected at the compound of the police station was not accurate but rather the accused was arrested at the enquiry counter in the police station itself. SP4 further agreed that the accused himself appeared at the police station on the request of ASP Moorthy. It was also suggested by the defence that the accused freely handed his handphone upon the request by SP4.

[22] There was some disagreement between SP4 and the defence counsel on how the handphone was retrieved. SP4 seems to suggest that there was some forceful request before it was finally handed over by the accused but the defence maintained that the accused had freely given his handphone when requested. P14 (arrest report) however was silent about the manner the handphone was obtained.

[23] The handphone of the accused is not relevant to any of the prosecution evidence, at least at this stage but perhaps may be relevant to the defence to show that the accused had surrendered himself freely and given assistance without any resistance.

[24] SP10 D/SI Tamilselvan a/l Munusamy a forensic team member via his witness statement PSP10 said on 24 July 2018 at about 9pm, he received a call from the IO ASP Radzee (SP11) to assist in the investigation of the crime scene in relation to FIR Semenyih Report 4532/18. SP10 left IPK Selangor and arrived at the scene at 10.45am.

[25] SP10 met with the IO SP11, the photographer SP2 and a few others who were already at the crime scene. After being briefed by SP11; SP10 and team proceeded to carry out their work including drawing the sketch plan, taking photos (by SP2) and gathering of the exhibits at the scene of crime.

[26] The crime scene was at the side road heading to Kuala Klawang-Semenyih, located near to Semenyih dam, a forestry location. The body of the deceased and surroundings were photographed by SP2. SP10 when testifying, appears to refer to the photos that had the marking '1' to '10' on small cards that marked the spot the samples were taken (and not the number marked by the photographer in circle at the side of every photos on the A4 paper) to show the exhibits and samples taken for DNA analysis by the forensic police team.

[27] SP2 (photographer) said he waited for the forensic to finish the tagging first before photographs were taken, hence the numbering '1' to '10' that was referred to by SP10. In addition, the details of these photos and what they referred to can be seen on p 5 of PSP10. The conclusion is that it was in SP10's knowledge, as he led the forensic team, he was aware of these numbers and what they were for.

[28] What can be sieved is that a body (identified as the deceased) with multiple slash on the face was found at the scene and a few exhibits found at the scene were collected for DNA testing. Rather unfortunate that no further details were asked by the prosecution as to why SP10 viewed these exhibits as material nor was there any evidence adduced as to the proximity of these exhibits to the body and the perimeters of the crime scene. Be that as it may, a Modenas motorcycle bearing registration No AJP6938 and a helmet was also found at the scene.

[29] As stated above, the important questions were not asked in the examination-in-chief of the witnesses but was sought by the defence in cross-examination. As to the Modenas motorcycle, the witness statement of SP11 IO suggests that the JPJ search confirmed it belong to the deceased Ganesh a/l Govendaraju. However, the result of the JPJ search was not tendered. SP9 Geva (who identified himself as a relative to the deceased) said that the motorcycle belonged to the deceased as SP9 travelled to that spot with the deceased on that motorcycle. There was no cross-examination by the defence on this.

[30] SP5 pathologist Dr Emizam found multiple injuries on the body of the deceased. There were multiple slashed and incised wounds on the body caused by sharp-edged and heavy objects. The injuries on the head were fatal in nature. This can be seen from the photos. The cause of death is multiple slash wounds

to the head. The post mortem report tendered as P15 contained a more precise facts in term of the measurement of the injuries.

[31] SP5 in cross-examination said there are 16 small stab wounds on the back body on the left side of the deceased body as in ID11(66). Having perused the post mortem report P15, this court noted the finding by SP5 that injury No 19 would fit this. SP5 says this shows the assailant had attacked the deceased multiple times. These injuries were small in size therefore possible an ice breaker being used. SP5 further added that with the injuries of different sizes found, he concludes that it is possible that more than one weapon being used and the deceased being attacked by more than one assailant.

[32] The prosecution called SP9 Geva Ratanam who said he knew the deceased as the deceased was a distant relative. From the questions asked by the prosecution, SP9 could understand Bahasa Malaysia although could not converse that well as he had stopped schooling at a very young age. He was able to testify and was able to answer questions in Bahasa albeit in short sentences.

[33] It would be appropriate at this stage to share some important introductory background evidence on SP9 and the accused's place of abode. SP9 stays in Sungai Besi and the accused in Ampang. This fact is relevant to explain the consequential evidence arising from SP9's testimony later. SP9 and the accused are close friends as the accused frequented SP9's house in Sg Besi often.

[34] SP9 under cross-examination, agreed that the deceased Ganesh was in fact an adopted son of Geva's aunt. SP9 Geva said he met with Ganesh (whom he called as 'Michael') as Ganesh @Michael had uploaded SP9's family photo with a posting on FB saying that SP9's family is a 'no good family' 'family takde bagus'.

[35] SP9 shared with the accused what Ganesh did and the accused responded saying 'ini macam saudara tak payah kawan'. SP9 however said he (SP9) was angry with the deceased but the accused was not. At least not yet, based on SP9's evidence. Further elaboration on this in the judgment below.

[36] The last date SP9 saw the deceased was on 23 July 2018. The deceased had spent the night before at SP9's house in Sg Besi. On 23 July 2018, SP9 and the deceased had spent the night drinking. It started under a bridge in Sg Besi in SP9's Sg Besi neighbourhood then they proceeded to Ampang where the accused joint them before the trip ended in Hulu Langat.

[37] SP9 said he went to these locations with Ganesh @ Michael on Ganesh's motorcycle. The accused came on his own. In Hulu Langat, they stopped at a

side road to drink further. It was dark at about 3.30 to 4am. SP9 said he was angry with Ganesh for saying bad about SP9's mother that resulted in SP9 hitting 'ketuk' the deceased's head with an ice breaker. SP9 also used the word 'cucuk' when describing his act on the deceased.

[38] SP9 said the accused had used a knife to slash (potong) the deceased on the deceased's back and face. SP9 described the knife to be about 1 1/2–2 ft long (the width of the witness box). SP9 said the deceased was no longer moving after the accused had slashed him.

[39] SP9 said both SP9 and the accused returned to the accused's house in Ampang and burnt the clothing worn by them during the incident, at the burning ground near the accused's house to dispose the traces. The weapons used were disposed at a nearby damp on the way back.

[40] SP9 also said that the deceased, the accused and himself smoked but was not sure if anyone smoked at the crime scene as it was dark. Under cross-examination, SP9 said the cigarette shared with the accused was brought to the location of the crime scene. The defence contends that the accused did not follow them to Hulu Langat and the cigarette used by the accused to smoke at Ampang was brought by either SP9 or the deceased to Hulu Langat and thrown there.

[41] SP10 (PDRM forensic) said a few exhibits were collected from the crime scene, for DNA analysis in addition to other samples that were taken by SP5 during the post mortem. These samples were sent to the chemist SP8. The result of the analysis by SP8, one that is very crucial is:

> i — The DNA of Puvaneswaran a/l Chellan (OKT) found on the cigarette butt marked '15' in SP8's forensic report P17.

[42] As to the marking of the samples, at least the cigarette butt marked '15' above, the witness statements of the PDRM forensic officer SP10, the IO SP11 and the chemist SP8 including the documentary exhibits referred to, contained the necessary markings to enable this court to comprehend what were the samples taken and what were analysed by the chemist that led to the result. This will be dealt with further below.

[43] The defence contends through cross-examination of SP9 and SP11 that the motive for the murder was that one Mugun Then had sought for SP9's help to find out the reason why the deceased had uploaded Mugun Then's wife naked photo onto his Facebook. Unfortunately, Mugun Then was not happy with the assistance rendered by either SP9 or SP9's family. To the contrary, this

triggered the deceased to upload embarrassing posting of SP9 and the accused's family on his FB (the deceased's FB).

CHAIN OF EXHIBITS

[44] SP10 said he found and marked these exhibits as stated in his witness statement (WS) PSP10 and at p 5 were listed as follows:

No 1 — mayat lelaki berpakaian lengkap

No 2 — (1) batang rokok jenama Canyon

No 3 — (1) helmet

No 4 — Kesan darah (swabbing diambil)

No 5 — (1) motosikal jenis Modenas ... no plat AJP 6938

No 5A — Swabbing peluh (diambil pada pemulas minyak eksibit No 5)

No 6 — (1) cawan plastic lutsinar mengandungi cecair warna perang (dijumpai atas tempat duduk eksibit no 5)

No 7 — (2) cawan plastic lutsinar (dijumpai dalam bakul eksibit No 5)

No 8 — (1) botol minuman plastic bertulis 'Coca-cola' tidak bertutup (dijumpai di atas rumput berhampiran eksibit no 5)

No 9 — (1) selipar belah kiri jenama 'Asadi' dijumpai atas jalan tar

No 10 — (1) batang rokok jenama Canyon dijumpai atas rumput di tepi jalan

F1–F2: (2) kesan cap jari dijumpai pada bahagian kepala motorsikal eksibit No 5.

[45] SP10 in his WS PSP10 said he handed these items to the IO SP11 on 24 July 2018 at 1215hrs. The handing over form tendered and marked as P25 shows all these. Although there were no questions asked by the prosecution on these numbers that relate to the exhibits, the identification of all these items from No (1)–(10) by this court, when cross-referred with the photos ID9, will show those numbers referred to the exact spot these items were found and gathered at the crime scene.

[46] The photos would have been taken by SP2 D/Kpl Mazlan as no other photographers were present and SP10 in his WS also identified SP2 as the photographer at the crime scene. This court observes that there is no photo of sweat No 5A as logically it could not have been captured by any photo but what SP10 had done to obtain this swab is reflected in his WS.

[47] The IO SP11 then instructed SP6 Kpl Misri to send these exhibits to the chemist SP8. What SP8 received from the IO and examined by SP8 have a different marking in term of its identity as they were contained in envelopes.

The reference by the chemist SP8 would be on the envelope number, what he found in these envelopes and examined by him.

[48] SP11 in his WS said that on 2 August 2018 he had instructed Kpl Misri (SP6) to send the samples to the chemist SP8. SP11 also said that he had sealed these items before handing them to SP6. The exhibits listed and handed to SP8 were identified by SP6 as in ID16 and were in envelopes. The exhibits were received by SP8 and acknowledgment receipt signed by SP8 and issued to SP6, tendered and marked as P16 by the prosecution.

[49] SP8 testified that he found two cigarette butts each in envelope '7' and '15'. SP8 also said he received and examined a left slipper and found to have the 'unknown male 1' DNA. This 'unknown male 1' is later identified from the deceased's finger print to be Ganesh @ Michael (whether the identity of the deceased proven will be discussed below).

[50] SP11 when testifying said some of the exhibits were obtained and handed to him by SP10 (PDRM forensic) whilst other exhibits were from the pathologist hospital. The slipper is particularly important as SP10 in his WS said he had gathered a left slipper from the crime scene whereas the right slipper as testified by SP11 came from the hospital. The photo of the right slipper can be seen in ID11(1) and reflected in the post mortem report P15.

[51] The right slipper was on the deceased body and hence could only be removed by SP5. SP11 said this slipper (tendered as P18B) was received from Dr Emizam SP5 and was sent to the chemist for analysis. This is not hearsay as SP11 was present at the post mortem and his picture was captured in ID11(1).

[52] The acknowledgment receipt P16 contained the following columns:

Bil., Tanda Ekshibit, Kuantiti, Keterangan.

In P16, the crucial exhibit would be the cigarette butt that contained the accused's DNA. There were two cigarette butts collected by SP10 and sent to SP11, and subsequently to SP8. They were contained in two separate envelopes marked as 'tanda ekshibit 7' and 'tanda ekshibit 15'. When SP8 opened the envelopes, SP8 found these two cigarette butts. These were tendered as exhibits in court and marked as P18F and P18F (1) (for envelope '7' and content) and P18N and P18N(1) (for envelope '15' and content).

[53] SP11 the IO also testified (amongst others) that he received these two exhs P18F and P18N from SP10 the PDRM forensic. SP11 testified that these cigarette butts were received from SP10 when P18F and P18N were shown to him.

[54] From these evidences, this court is able to make a finding that there is no doubt that the exhibits that were collected at the crime scene and those gathered by the pathologist, were sent to the chemist. SP11 was aware of this and P16 supports this finding. P16 shows envelope '3' with Hospital Serdang seal and envelope '14' with forensic seal with the examination of the envelope found to contain as at p 2 of P17 (the chemist report), the right and left slipper of the deceased. The right slipper on the deceased would link the deceased as the same body at the crime scene as the left slipper was found there.

[55] With this finding, this court rules that there is no break in the chain of exhibits as alleged by the defence. It would have been easier to come to this finding if the prosecution had been consistent in asking the witnesses who were involved in handling the exhibits from the first point until the final point be shown to identify what the exhibits were, in what envelope and what the markings or numbering made but unfortunately, it was not done. Thus, it is tasked upon this court to cross-refer to the necessary contemporaneous photos and documentary exhibits to enable this court to come to the said finding.

PHOTOGRAPHS: WHETHER REMAINED AS ID

[56] The photographs of the crime scene ID9 and ID11 were tendered through the photographer SP2 D/Kpl Mazlan. Initially ID9 consisted only 38 as opposed to 40 as stated in SP2's witness statement PSP2. SP2 said there were 40 when he had handed them to the IO SP11 in the form of the CD P10.

[57] SP2 also testified that he had used a digital camera Canon 7500 and a SANDISK ULTRA memory card that was in good working order ('sempurna'). He had printed the photos using a NORITSU machine. SP2 had transferred all the images in the memory card into the CD.

[58] Before the innovation in the usage of digital camera, the traditional camera had used films and these films would need to be tendered in court as the films would be the primary evidence. In current situation, it would be the memory card substituting the films as primary evidence.

[59] SP2 said the images in the memory card had been deleted to avoid multiple images causing a full load memory to the card. It is also to avoid virus contamination as one memory card is used for one camera and it is the same memory card to capture all evidence. As a matter of fact, the memory card when brought to court and checked by the defence, was confirmed to be empty.

[60] The explanation is noted by this court and is a significant one and ought to be sufficient to explain the deletion. However, the defence counsel has been consistent in objecting to the photos been made exhs 'P'. This court is of the

view that perhaps a few more explanation to say that the memory card is also used to capture evidence of other cases and not just evidence of this case alone and that is why, images once transferred to the CD will be deleted as the memory card is recycled to be used in the same digital camera to capture photos of other cases. That may satisfy the deletion of the images and the need for this court to return the memory card as proposed by the prosecution.

[61] The persistence by the defence against the conversion of the photos into exh 'P' on the other hand ought to be taken by the prosecution as a reminder to be more thorough in term of the presentation of the evidence especially in preparing the witness statement. If witness statement is opted, then it ought not to be shallow. Otherwise, it defeats the purpose of legislating s 402B.

[62] In the course of SP2's evidence, the prosecution had also tendered a s 90A certificate marked as P12 signed by SP2. The certificate states amongst others 'Saya mengaku bahawa imej digital yang saya pindahkan dari kad memori ke cakera padat (CD-R) menggunakan peralatan di atas adalah dalam bentuk asal tanpa sebarang pindaan bagi siasatan kes bersabit Semenyih Rpt 4532/2018'.

[63] This certificate is relevant as it shows the images have not been tampered with and are in their original version for the investigation into Semenyih Report 4532/2018, thus the evidence pertaining to the crime scene is secured and preserved. In the course of the trial, the photographs have been referred to for purpose of examination-in-chief and cross-examination. The contents of the photographs have been viewed by this court and the witnesses in particular the pathologist. There is no doubt the contents of the photographs are as originally photographed, and not manipulated.

[64] This court had also marked the exhibits identified by SP11 (IO) into 'P' those exhibits amongst others are:

(a) the cigarette butts marked as P18(F) and (N) respectively; and

(b) the two slippers (one from PDRM forensic SP10 and one from SP5 pathologist) marked as P18(B) and (M) respectively.

CHALLENGING THE ADMISSIBILITY OF COMPUTER GENERATED EVIDENCE — THE PHOTOS

Conversion to 'P': Whether court functus officio

[65] The defence further argued that this court is functus officio as the prosecution has closed its case and the last application to convert these photos into 'P', made by the prosecution when SP11 testified, was again refused by this

court. To this submission, this court agrees only to the extent that the prosecution has closed its case with the last attempt to convert the photos to 'P' refused by this court as no further submission was put forth by the prosecution. This court however, differs that this court is functus officio.

[66] In *Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272 Mohd Zawawi JC (as he then was) in discussing this issue, said as follows:

> [14] 'Functus officio', yang diterjemahkan dari perkataan Latin sebagai 'having performed his or her office', dan ditafsirkan sebagai 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished' (lihat *Black's Law Dictionary* (Edisi ke 7, 1999) ...
>
> [15] Terdapat beberapa kes yang diputuskan oleh mahkamah-mahkamah di Malaysia berhubung dengan isu 'functus officio'. Bagi tujuan penghakiman ini, rujukan akan dibuat kepada kes *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260. Dalam kes tersebut, Hakim Abdul Malik Ishak (sebagaimana beliau ketika itu) telah membincangkan secara panjang lebar isu 'functus officio' dengan membuat rujukan kepada beberapa kes yang diputuskan oleh mahkamah Australia dan Amerika Syarikat. Di ms 267 beliau berkata seperti yang berikut:
>
> > I will now refer to the case of *Leung and Another v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76 a decision of the Federal Court of Australia with a coram of Beaumont, Heerey and Finkelstein JJ. There, Finkelstein J, had this to say (see p 84 of the report):
> >
> > *The origin of the principle of 'functus officio' as that expression is currently employed is to be found in the latter part of the last century in England when it was decided that a final decision of a court could not be reopened. The reason given was that the power to reopen a dispute had been transferred to the court of appeal*: *Re St Nazaire Co* (1879) 12 Ch D 88. The rule applied only after the formal judgement of court had been passed and entered and was subject to two exceptions, viz where there had been a slip in drawing it up and where there had been an error in expressing the intention of the court: *Re Swire* (1885) 30 Ch D 239; *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Ainsworth v Wilding* [1896] 1 Ch 673.
>
> [16] Dalam satu keputusan kes Mahkamah Agung Kanada *Chandler v Alberta Associations of Architects* [1989] 2 SCR 848, Hakim Sopinka berkata mengenai 'functus officio' seperti yang berikut:
>
> > (1) 'Functus Officio'
> >
> > *Jowitt's Dictionary of English Law* (2nd Ed, 1977) *defines functus officio as 'having discharged his duty'; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted*. The holding of Morton J in *Re v GM Holdings Ltd* [1941] 3 All ER 417 (Ch D), is well summarised in the headnote:
> >
> > Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of

obtaining any variation is to appeal to a higher tribunal. A

An editorial note added that:

This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is 'functus officio', and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction. B

Black's Law Dictionary (5th Ed, 1979) defines 'functus officio' as 'a task performed':

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also, to an instrument, power, agency, etc, which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect. C

The doctrine of functus officio states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd And Laundry, Dry Cleaning and Dye House Workers' International Union,Local No 292* (1964), 44 DIR (2d); [2008] 4 MLJ 272 at 283 463 (BCSC)) 'To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine (the appellants' factum, at p19). D E

Seterusnya pada para 20 (SCJ) hakim berkata:

As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can do so only if authorised by statute or if there has been a slip or error within the exception enunciated in *Paper Machinery Ltd v JO Ross Engineering Corp* [1934] SCR 186. F G

[67] In *Chin Wai Leong & Ors v Public Prosecutor and another appeals* [2019] MLJU 1962, the COA in the judgment by Yew Jen Kie JCA said:

[46] It is the pertinent to point out at this juncture that the Appeal Panel had invited all parties to submit on the issues whether the Appeal Panel had functus officio before allowing the prosecution's application to withdraw the 70 charges and altering the conviction on 224 charges to 154. Hence, there is no breach of natural justice as all parties had been given opportunity to be heard and to advance their argument on the issue of functus officio. H

[47] The phrase 'functus officio' as found in *Words and Phrases Judicially Defined* (1990 Ed) has been defined as follows: I

It is not clear how the words functus officio crept into the order appealed from. *Functus officio means a person who has discharged his duty, or whose office of authority is at an end (see Bedwell v Wood* (1877) 2 QBD 626*). Thus, once a*

> *president has convicted a person charged with an offence before him, he is functus officio, and cannot rescind the sentence and retry the case. Similarly, once he has tried a civil action and made an order on the final determination of the dispute between the parties, he is functus officio and cannot rescind his final order and retry the case, or try a subsequent action between the same parties on the same subject matter.* In the present case, the learned President became functus officio as regards the earlier action on his refusing the plaintiffs' application for its reinstatement, but he certainly did not become functus officio as regards the real dispute between the parties which he never tried, the issue between the parties being whether the plaintiffs were entitled to recover the money which they alleged they had paid to the defendant under a mistake of fact.' *New India Assurance Co Ltd v Karam Singh* [1972] 2 MLJ 26 per Gill JF. (Emphasia added.)

[48] We take note that Mr Harpal, learned counsel for the third applicant, in the submission on functus officio before the appeal panel took the position that a court sitting in a criminal jurisdiction is not functus officio until a sentence has been passed, relying on *S v Recorder of Manchester* [1971] AC 481, wherein the House of Lords opined:

> *The primary meaning of the word 'conviction' denotes the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by a sentence. Until there is such a judicial determination the case is not concluded, the court is not functus officio …*

[49] The aforesaid House of Lords' view found approval in *Public Prosecutor v Jamalul Khair* [1986] 2 MLJ 371, which held:

> if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. The learned President was not functus officio in this case until she had passed a sentence or had otherwise finally adjudicated the matter …

[68] On the authorities cited above, this court is of the view that this court is not functus officio at this stage as the real determination now is whether the prosecution has proven a prima facie case or not, which is yet to be decided by this court. This court is still within the parameters to adjudicate the consequential issues arising before making its final determination at the close of the prosecution case.

[69] Furthermore, when SP11 was asked to identify the exh P18 which were converted to 'P' by this court despite objection by the defence that these were not shown to be identified by SP10 (PDRM forensic), this court ruled that the marking as 'P' will remain subject to submissions by both parties at the close of the prosecution case.

[70] The conversion to 'P' was done on the basis that SP11 was present at the scene with SP2 (photographer) and SP10. The photographs were shown to him

(IO) during the investigation and were in the IO's custody and so were the exhibits as stated by SP10 in his witness statement PSP10 the last para 'Pada 24.7.2018 jam 1215hrs, team forensic IPK Selangor telah selesai pemeriksaan di tempat kejadian dan menyerahkan semua barang kes bersama-sama borang akuan serah terima barang kes kepada ASP G/16952 Mohd Radzee B Jamudi untuk tindakan selanjutnya'.

[71] Ideally, the exhibits that were gathered and handed over ought to be identified by SP10 in court. But, the omission to do so by the prosecution does not render the identity of the exhibits, questioned, or credibility challenged as SP11 (IO) had identified and acknowledged receipt of them and were the same as in P16. As said earlier, the contents of the photographs are not something that can be reinvented or re-enacted to give rise to the integrity of the exhibits questioned.

[72] In *Mohd Khayry bin Ismail v Public Prosecutor* [2014] 4 MLJ 317, the Court of Appeal in the judgment delivered by Hamid Sultan JCA on CCTV recording said as follows:

> at common law any form of tape recording, video recording, etc; if relevant is made admissible if the court is satisfied of its accuracy and that it has not been tampered with, etc. The jurisprudence relating to its admissibility as well as ss 3 and 61 of the EA 1950 is set out in *Janab's Key to Criminal Procedure and Evidence* (2nd Ed) and it reads as follows:
>
> > Document before the 1993 Amendment A 851 to the Act was defined in section 3 of the Act to mean any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter. Under the new amendment it includes any matter embodied in a disc, tape, film, sound track or other device whatsoever. A wide and extended meaning has been given to the definition 'document'. Previously documents at least related to things which could not be easily tampered with. Now documents include items which could be easily tampered with. *It is submitted that the admission of such documents which could be easily tampered with must be admitted with caution.*
>
> In *R v Maqsud Ali* [1965] 2 All ER 464 Marshall J observed:
>
> > ... for many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The print as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording conversations. We see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but *it does appear to this court wrong to deny to the law of evidence*

A *advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified* provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence.

B Such documents when produced for the inspection of the court are referred to as documentary evidence. Thus, documentary evidence may include not only documents in writing but also maps, plans, graphs, drawings, photographs, discs, tapes videotapes, films and negatives (see *Cross on Evidence*).

C **[73]** On this basis, this court having satisfy itself that the contents of the photographs are genuine, original without any tampering, finds that the photographs are admissible and decided that they are to be marked as 'P'. In addition, parties were made aware of this issue and given the opportunity to address this point in their submission. Otherwise, the defence would not have raised the issue of functus officio. Thus, the rule of natural justice that court will hear parties before making a final ruling is complied with.

D

IDENTITY OF THE DECEASED

E **[74]** The evidence by the prosecution was that the identity of the deceased was not known at the time the post mortem was performed. However, the following evidence from SP11 was that arising from the finger print result taken from the deceased shows that the identity of the deceased being Ganesh a/l Govendaraju (No KP 890504–14–6749). The trailing movement of the deceased commencing from the time he left Ampang with SP9 until he reached the Hulu Langat crime scene, with his motorcycle found at the scene, his body seen by SP3 (lorry driver) that led to a subsequent inspection by SP10 and SP11 and the deceased's finger print sent for identity tracing which came back as 'Ganesh', the conclusion at the end points to the identity to be none other than the deceased.

F

G

[75] This court agrees with this submission, provided there is sufficient proof in relation to the lifting of the finger print and the result of the finger print testing was said to contain in the finger print report, which surprisingly was not tendered by the prosecution.

H

[76] SP11 in his witness statement PSP11 para 6 said 'cap jari simati telah diambil untuk identifikasi mayat', this was done when post mortem was carried out and at para 11 said '... telah terima laporan cap jari tersebut adalah milik simati ...'.

I

[77] SP5 pathologist in his WS PSP5 was silent about this and only in cross-examination, when asked by the defence as to who claimed the deceased body, did SP5 candidly agree it should have been reflected in his post mortem

report. Be that as it may, SP5 said who claimed the body is reflected in the 'borang pengendalian jenazah'.

Hearsay evidence on the identity of the deceased

[78] SP11 when cross-examined said he identified the body being the same body that was retrieved at the crime scene and sent to SP5 at the hospital. The identity of the deceased was obtained through the finger print analysis but the finger print report was not tendered. The deceased's sister came to the hospital to claim the body but the sister was not called. The 'borang pengendalian jenazah' that was prepared by SP5 before the body was released also not tendered. Pausing on this issue for a moment, the only evidence available is the finger print result. However, unless the finger print expert called or the finger print report tendered, SP11's evidence would only be hearsay.

[79] The only evidence available before this court at the end would only be:

(a) SP9 left with the deceased on the deceased's motorcycle to the crime scene;

(b) SP9 recognised the deceased as the deceased was an adopted son of his relative;

(c) SP9 said they went to that spot of the crime scene;

(d) SP9 and accused 'attacked' the deceased and left the deceased body there;

(e) SP3 saw the body and informed the police;

(f) SP10 and SP11 went to the same scene;

(g) SP11 sent the body to SP5 and was with SP5 for the post mortem; and

(h) SP11 identified the body as the same body found at the crime scene.

[80] Decided cases on the need to prove the deceased's identity are many. A few of those referred to by the defence in the defence's submission will be ventilated in this judgment as follows:

(a) *Fazal Din v Public Prosecutor* [1949] 1 MLJ 123:

In *Fazal Din*, the evidence gathered by the trial judge was that the deceased was still alive, when the witnesses left him, based on the witnesses' testimony. These witnesses (the deceased's neighbour) left the deceased alone, to report to the police station on what they saw being two identified persons beating the deceased with sticks.

The investigating police officer went to the scene with these three Indian witnesses. There he found the deceased lying motionless on the ground. The IO gave no evidence of sending the body of the deceased to the

hospital for post mortem examination.

There is no evidence that the body on which the medical officer conducted the post mortem examination was the body of the deceased. Turning to the evidence of the medical officer on this point, he said:

> On 7 June 1948, in the evening, I received the dead body of a Sikh at 10.15pm. The body was identified by PC 9185. The name was given as Achar Singh. Before the post mortem the body was again identified by PC 9185.

The appellate court found that PC 9185 was not called to give evidence at the trial, though it appears from the record that he was present in court and was tendered for cross-examination. Counsel for the defence did not wish to cross-examine him. That being so, the evidence given by the medical officer as to the identification of the body on which he performed the post mortem examination is hearsay and inadmissible. Accordingly, there is no admissible evidence on the record that the medical officer performed a post mortem examination on the body of the deceased, but merely that he did perform a post mortem examination on the body of a Sikh as to whose identity there was no evidence.

In addition to this, the more crucial evidence was that the alleged 'murder weapon' said to be a club exh P1 although found with blood stain (no DNA testing available at that time), was not identified by the three witnesses to be a probable stick they saw being used. Since the deceased was left for sometime before the arrival of the police IO, the probability that the deceased was hit by someone else when he was left alone cannot be ruled out;

(b) *Teay Wah Cheong v Public Prosecutor* [1964] 1 MLJ 21:

The conviction was set aside as the High Court was not satisfied with the identification of the deceased as follows:

> The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to the hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam's name. The medical officer stated inter alia that the 'patient died at 10.30am the same day' and 'I handed the deceased to his relative on the same day'. In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have stated clearly that he personally saw the dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this 'relative' was. The wife of Abdul Salam simply stated that she accompanied

her husband to the hospital with the police and she identified her husband to the police on the same day the husband died. A

(c) *Dublin Edward Tinggi v Public Prosecutor* [2018] 1 LNS 197:

Although the submission by the defence in *Dublin*'s case was that there was no evidence led to prove the identity of the deceased, thus resulting in the conviction by the session court judge on a s 304 charge bad as the deceased's relative who identified him at the post mortem was not called to testify, the High Court ruled that there was other evidence to prove the deceased's identity. B

The High Court judge found that the trailing evidence shows that the deceased's son was present at the post mortem to identify the body of the deceased in the presence of PW7 (IO) and PW8 (photographer). PW7 and PW8 had confirmed that the son of the deceased had identified the body of his father. C

The evidence showed that PW2, PW3 and the deceased were at the paddy field on the day of the incident and PW2 accompanied the deceased from the paddy field to Sri Aman Hospital and from there to SGH where the next day the deceased was pronounced dead by PW1. When the deceased was admitted to Sri Aman Hospital, he was attended to by PW4. When he was transferred to SGH, he was attended to by PW1. PW7 then requested for the post mortem to be carried out. PW6, a police photographer took photographs of the deceased and of the post mortem carried out. The photographs were tendered as exhs P3, P9 and P10 through PW6. The wife and children of the deceased were shown in photograph 1 of exh P9 which was taken before the post mortem. The High Court was satisfied that the identity of the deceased was proven. D E F

(d) *Husin bin Ismail v Pendakwa Raya* [2000] MLJU 392:

The conviction by the lower court was set aside by the High Court for the following reason: G

> In the instance case although SP3, the husband of the deceased, the investigating officer SP8 and the medical officer SP10 who examined the deceased were called to testify on behalf of the prosecution, the prosecuting officer at the lower court did not ask these three witnesses any question to establish the identity of the deceased. In fact, there was no evidence adduced through any of the witnesses as to the identity of the deceased. The investigating officer SP8 and the medical officer SP10 also did not identify each other. The medical officer SP10 was not even asked how he obtained the name of the deceased as stated in the medical report of the deceased which was marked as exh P11. H I

[81] Based on these authorities, the pertinent points that can be sieved are as follows:

(a) identification of the deceased is very important and the relevant

witnesses must be called and asked the necessary questions in order to satisfy proof of the deceased's identity;

(b) identification of the deceased may be proved by direct evidence of the family members of the deceased present at the post mortem; and

(c) identification of the deceased may also be proven by circumstantial evidence by the police officer and other witnesses who would be able to testify to that effect, an example is by relying on the finger print comparison.

[82] In *Adiswaran a/l Tharumaputrintar v Public Prosecutor and other appeals* [2014] 3 MLJ 228, the Federal Court in deciding the correctness of the trial court's decision on the identity of the deceased found as follows:

> The learned trial judge, after evaluating the evidence of PW7, PW9, PW15 and PW18, concluded that the deceased was Manivanan s/o Vellaysamy and that Manivanan s/o Vellaysamy and Kalidash s/o Arumugam was one and the same person. At paras 30, 31 and 32 of her judgment the learned trial judge said:
>
> > 30. Bagi saya, setelah saya meneliti keterangan SP21 itu, adalah jelas bahawa keterangan SP7 mengenai perbezaan profil DNA bagi jasad set kedua berbanding dengan profil DNA bagi jasad set pertama adalah disebabkan oleh bakteria dan organisma yang lain yang boleh menukar dan menyebabkan 'degeneration' DNA yang diambil itu setelah jasad set kedua itu terendam dalam air tanah dan najis dalam loji kumbahan itu adalah sangat bermunasabah dan sebenarnya tidak bercanggah dengan keterangan SP21, yang juga telah memberi alasan mengapa beliau (SP21) tidak dapat profil DNA bagi tulang 'N(B)' itu ialah kerana tulang itu telah membusuk atau rosak. Oleh yang demikian saya menerima keterangan SP7 bahawa jasad set pertama dan jasad set kedua adalah datangnya daripada orang yang sama setelah mengambil kira bukti-bukti lain dan sebagaimana yang saya telah memperincikan sebelum ini.
> >
> > 31. Adalah juga dapatan fakta saya bahawa berdasarkan keterangan SP7, SP15, SP9 dan SP18, Manivanan Vellaysamy itu juga dikenali sebagai Kalidash a/l Arumugam rekod jenayah No 1567696. Mengikut keterangan SP15 beliau telah menerima permohonan (P22) untuk membuat perbandingan cap jari daripada SP18 pada 12 Ogos 2004 (cap jari tangan kanan Si Mati telah diambil oleh SP7 sebelum itu). Hasil pemeriksaan dan perbandingan ke atas cap jari itu beliau dapat kesan ianya atas nama Kalidash a/l Arumugam, rekod jenayah No 1567696, seorang warga negara India (P23). Bahawa Kalidash a/l Arumugam telah dituduh dan dihukum di bawah s 224 Kanun Keseksaan pada 2 November 2001 ...

[83] In *Adiswaran*, the finger print analyst SP15 was called and the result of the finger print comparison was adduced orally. In our present case, the finger print analyst was not called nor was the report tendered. In *Adiswaran*, the earlier evidence by the deceased's girlfriend known as 'Jayanthi' who was able to identify the deceased as 'Manivanan', having identified the two rings found on

the fingers and the 'tali' on the body part of the deceased was rejected by the Federal Court on the reason that it is hearsay as Jayanthi was not called as witness by the prosecution.

[84] In our present case, this court is of the view that despite the fact that the finger print report was not tendered, there are evidences that can be gathered which proves the identity of the deceased to be 'Guna' as follows:

SP9: left with the deceased to the crime scene in Hulu Langat. The motorcycle of the deceased was found by the road side;

SP3: notified the police on his discovery of the body that same morning to SP1;

SP1: notified the MPV team to the scene and SP11 followed subsequently;

SP11: arrived at the scene the same morning with the MPV team manning the area;

SP11 brought the body to SP5 pathologist;

SP9 shown the photos of the crime scene and identified the motorcycle being one that belonged to the deceased. There was no cross-examination of SP9 challenging this but further reinforced this fact that the motorcycle belongs to the deceased;

SP9 also said the deceased was sitting on the steel divider when SP9 injured him using the ice breaker and SP 11 also confirmed there was blood on the steel divider near the motorcycle;

SP11's evidence points, to the inevitable conclusion is that there were no other death or murder at that same spot that day and time except one of Guna.

[85] The question thus whether these evidences are sufficient to prove that the deceased is Guna. His face structure was no longer visible to enable a facial recognition to be done, unless there are some personal items found on the deceased and identified by the deceased's family member, as in the case of *Adiswaran*. But there are none, except for his motorcycle found at that crime scene.

[86] In *Adiswaran*, if Jayanthi had been called the evidence would be admissible to prove the recognition of the identity of the deceased body parts through the personal items found on the deceased.

[87] Similarly, in this present case SP9 said he was a pillion on the deceased's motorcycle. He acknowledged that the photo shown to him (SP9) by the prosecution was the deceased's motorcycle. This court accepts this affirmation as SP9 took a ride on this motorcycle from Sg Besi to Ampang then to that spot in Hulu Langat with the deceased and thus would be very familiar with the motorcycle. The defence in cross-examination did not dispute the fact that the deceased's motorcycle was found at the scene.

[88] The Evidence Act 1950, s 21 permits such prove by way of inferences

arising from positive statement or in short 'admission':

> 21 Proof of admissions against persons making them and by or on their behalf
>
> Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:
>
> (a) an admission may be proved by or on behalf of the person making it when it is of a nature that, if the person making it were dead, it would be relevant as between third persons under section 32;
>
> (b) an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when that state of mind or body existed and is accompanied by conduct rendering its falsehood improbable;
>
> (c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

It is termed 'admission' as the other party does not challenge the positive statement. Illustration (a) to s 21 further elaborates this proposition:

> ILLUSTRATIONS
>
> (a) The question between A and B is whether a certain document is or is not forged. A affirms that it is genuine; B that it is forged. A may prove a statement by B that the document is genuine, and B may prove statement by A that the document is forged; but A cannot prove a statement by himself that the document is genuine, nor can prove a statement by himself that the document is forged.

With this finding, this court rules that the identity of the deceased is proven to be Guna by the fact that SP9 travelled with the deceased on the deceased's motorcycle.

Whether prima facie case proven: Whether the fatal injuries leading to the deceased's death caused by the accused?

[89] The defence argued that it was SP9 Ganesh who was drunk that caused the fatal injuries leading to the deceased's death as it was alleged that the accused did not follow SP9 and deceased to the crime scene at Hulu Langat (the fact that SP9 drank bottles of whisky and cans of beer not disputed by the prosecution). SP5 pathologist also found the deceased's blood to have alcohol of 531mg per 100ml as in P15.

[90] However, if this contention is accepted, there would still be pieces of puzzle incomplete and raises the following questions as follows:

(a) if SP9 was drunk and the accused did not follow SP9 and the deceased there, how did SP9 travel back home as the deceased's motorcycle was left at the scene;

(b) the number of cups found at the scene suggest more than two people were there; and

(c) the pathologist (SP5) evidence based on the injuries found on the deceased suggests more than one weapon used by more than one suspect.

[91] SP5's evidence put together with the evidence of the chemist (SP8) and the evidence in cross-examination of SP11 (IO) led this court to the following findings:

(a) the injuries were multiple of different forms and sizes including measurements, suggestive of different weapons being used;

(b) the finding of DNA of the accused on the cigarette butt retrieved at the crime scene suggests the presence of the accused there thus supports SP5's finding that more than one suspect caused the injuries on the deceased;

(c) SP9 Guna said the weapon used by him was an ice-breaker whilst the accused had used a knife described by SP9 to be of about 1 1/2–2 ft in length;

(d) the injuries caused by an ice-breaker is distinct and able to be distinguished by SP5. SP5 said these injuries appeared as 16 small stab wounds at the left side of the back of the torso as opposed to slash injuries found on the deceased's body and face leading to the deceased's death caused by a different weapon;

(e) SP9's evidence only mentioned the deceased and himself (SP9) were drinking at the Sg Besi bridge but the accused joint them subsequently in Ampang;

(f) if the accused was travelling on his motorcycle with that 1 1/2–2 ft long knife, whilst the deceased and SP9 was travelling together on the deceased's motorcycle from Sg Besi, the deceased would have seen the accused carrying the knife (as it is highly improbable for the knife to be folded), hence this court accepts the version that the accused only joint them in Ampang without the deceased being aware the accused had the knife with him but all three eventually headed to the same spot in Hulu Langat;

(g) SP9 would have travelled back from the crime scene to the accused's house (a distance of more than 30 minutes away) with the help of the accused on the accused's motorcycle; and

(h) the blood samples of other suspects (Mugun Then, Tenageran, Puganeeswari a/p Arunachalam, Suguna Sundary a/p Arunachalam) were also collected and sent to the chemist for comparison, but none matched with the samples on the exhibits taken at the crime scene.

Is there motive to kill and who has that motive

[92] The next question to be addressed is, is there motive to kill and on whose part is the motive to do such act? SP9's evidence is that the deceased had uploaded embarrassing posting of both SP9's family and the accused's family. This was done after SP9 and family had failed to help Mugun Then make the deceased removed the posting of Mugun Then's wife naked photo on the deceased's FB.

[93] SP9 testified that he shared with the accused, the deceased's posting of Mugun Then's wife. The accused responded saying 'ini macam saudara tak payah kawan'. However, SP9's evidence was that the accused was equally concern as the deceased had also uploaded on FB the posting of the accused's family. Being concern, the accused frequented SP9's house every day to look for the deceased. The only reason for the deceased to do so must arose due to the intervention by SP9 and the accused, causing the deceased to be antagonised.

Evidence of SP9: Accomplice

[94] This court accepts the defence submission that SP9 is an accomplice as SP9 himself would have the same motive to kill the deceased and the fact that SP9 was also armed and had played a role in causing a certain degree of injuries on the deceased. In *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 the Federal Court in the judgment by Augustine Paul JCA when discussing the evidence of an accomplice quoted as follows:

> 37 ... In *Davies v Director of Public Prosecutions* [1954] 1 All ER 507 it was held that persons who are *particeps criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplices. In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) (Vol 4) says at p 3434–5:
>
> > A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime; everyone is an accessory after the fact to a felony who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.

...

39. On the facts of this case PW4 played a very active role in his capacity as an accessory after the fact. His evidence must therefore be corroborated.

40. In dealing with the nature of evidence that can be termed as being corroborative Lord Reading CJ said in *R v Baskerville* [1916] 2 KB 658 at p 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

41. It was further held in that case (at p 667) that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. In commenting on the same issue *Sarkar on Evidence* (15th Ed, Reprint 2004) (Vol 2) says at p 2099:

> The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime (*Swaminathan v S* AIR 1957 SC 340). The corroboration need not consist of evidence which standing alone would be sufficient to justify the conviction. All that is required is that there should be sufficient corroborative evidence to show that the approver is speaking the truth with regard to the accused whom he seeks to implicate (*Bishnupada v R* AIR 1945 C 411; *Autar Singh v S* AIR 1960 Pu 364; *Rameshwar v S* AIR 1952 SC 54; see *Swaminathan v S*; *Ambika v R* 35 CWN 1270).

[95] Based on the evidence above, this court finds that SP9 not only assisted in concealing the crime but had participated in procuring the deceased to the scene and facilitating the deceased to be drunk by making available the beer, thus making it an easy task for SP9 himself and the accused to cause the injuries on the deceased. This makes SP9 an accomplice as 'a principal of the second degree being a person who is present and assists in the perpetration of the crime', recognised by our Federal Court in *Francis Antonysamy* above.

[96] However, an active accomplice evidence remains admissible when corroborated by other evidence. Otherwise, certain offences may not see light being charged as the witness itself is an accomplice who, taking this argument, would be concerned only to implicate another whilst disassociating himself of the said crime.

In *R v Roach* [1985] PEIJ No 73, the appellate court on the accomplice issue said:

> The indictment against the respondent charged that he had committed an offence under s 423(1)(d) of the Criminal Code by conspiring, with Robert and Karla

A Richard and others unknown, to commit the indictable offence of trafficking in narcotics. The trial judge directed the jury to return the not guilty verdict at the conclusion of the Crown's case.

21. The second issue raised by the appeal concerns the failure of the trial judge to consider the evidence of the respondent's alleged co-conspirators, Robert and Karla
B Richard, in determining whether or not there was any evidence of the respondent's own acts and declarations from which a jury could find that he participated in the conspiracy.

22. The trial judge ruled that whatever evidence was tendered to show the respondent participated in a conspiracy to traffic in marijuana did not come from
C his own acts and declarations but from the words of a co-conspirator; and, therefore, he could not consider it.

Appellate Court overruled the acquittal and said as follows:

D 30. No rule of law prevents the trial judge from considering the evidence of co-conspirators as to the acts and declarations of the accused in order to determine whether the Crown has produced any evidence that he participated in a conspiracy. The prosecution in conspiracy trials often bases its case on the evidence of co-conspirators. In some cases, the only evidence connecting an accused to the conspiracy comes from the testimony of a co-conspirator.

E 31. *An accomplice not charged or charged but tried separately*, remains competent and compellable as a witness for the prosecution. However, the circumstances in a particular case might require the trial judge to caution the jury about the danger of convicting the accused on the uncorroborated evidence of the accomplice.

F Corruption between giver and receiver, consensual rape between underage and incest to name a few, are examples of such offences, with the accomplice represented as 'victim' in the said crime. In *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 (FC) had to deal with the question on 'whether a witness alleging that he had been given gratification by the accused is, prima
G facie, an accomplice?' said 'answer to question No (1) is in the negative and there was therefore no need to deal with question (2). Thus, in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus
H reus'.

[97] Being peculiar with this situation, our legislators had addressed this in the Evidence Act 1950 and courts have readily given their determination on related issues arising:

I 114 Court may presume existence of certain fact

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume —

(a) ...

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;

133 Accomplice

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

This court finds that the accomplice SP9's evidence is corroborated as follows:

(a) SP5 corroborated SP9's evidence that the accused used a knife when SP5 found distinct slash injuries on the deceased;

(b) SP5 also corroborated SP9's evidence that the deceased drank beer and whisky when SP5 found the deceased's blood to contain alcohol;

(c) SP8 corroborated SP9's evidence that the accused smoke when DNA of accused found on the cigarette butt; and

(d) SP11 corroborated SP9's evidence that the deceased was seated on the steel divider when SP9 stabbed him, when blood was found there.

[98] The defence attempted to challenge SP9's credibility by suggesting that SP9 had given a different version in examination-in-chief and cross-examination on who joined SP9 to drink in Sungai Besi. SP9 has always been consistent when SP9 from the beginning did not name the accused as one who was drinking with him in Sungai Besi but only the deceased. Despite being soft and short in his reply, SP9 has always maintained the version of his story.

[99] In *Public Prosecutor v Mohd Azam bin Basiron & Anor* [2011] 3 MLJ 741; [2010] 9 CLJ 1, the Court of Appeal in dealing with accomplice evidence said:

... the requirement of corroboration in respect of accomplice evidence is a rule of practice and prudence and not requirement of law: If we may add, even before reaching the stage of considering the question of corroboration and its adequacy, a presiding judge in the first place needs to decide whether that accomplice is a reliable witness or not. If he is not, the matter ends there, as his evidence has to be rejected, even if the prosecution can adduce evidence capable of being construed as corroboration (*Director of Public Prosecution v Killbourne* [1973] 1 All ER 440). In a given set of facts, an accused person may be convicted premised on an accomplice's uncorroborated testimony pursuant to s 133 of the Evidence Act 1950, as corroboration is required only as a rule of practice and prudence (*Tinit & Ors v Public Prosecuter* [1964] MLJ 389; [1964] 1 LNS 210 *Bhuboni Sahu v King* 1949 AIR 257). In a given situation too where there exitss (sic) no corroboration, a

corroborative warning is required to be administered by the court to itself though the format is not fixed (*Jegathesan v Public Prosecutor* [1980] 1 MLJ 165; [1978] 1 LNS 74). It is only in rare instances a trial judge will convict an accused person upon the uncorroborated evidence of an accomplice (*TN Nathan v Public Prosecutor* [1978] 1 MLJ 134; [1977] 1 LNS 127). If corroboration is needed implying that the accomplice has passed the hurdle of reliability, such corroboration must be independent and relates to material particulars pertaining to the accused person's culpability (*R v Baskerville* [1916] 2 KB 658).

[100] SP9 equally has always maintained in examination-in-chief and cross-examination that the FB posting also affected the accused as the FB posting also concerns the accused's family. SP9 said the accused was disturbed by this and frequented SP9's house to check if the deceased was present. With this observation, this court finds that SP9 is a credible and reliable witness.

[101] This conclusion is arrived at having observed SP9 when testifying and being constant in his version despite being challenged by the defence on the following:

(a) only SP9 and the deceased had beer in Sungai Besi and accused only joint them in Ampang;

(b) SP9 did not hide the fact that he had also hit the deceased using an ice breaker as found by SP5 the pathologist to be consistent in term of the injuries;

(c) the deceased also uploaded posting of the accused's family on the deceased's FB; and

(d) SP9 was not contradicting himself when he merely said the deceased had uploaded embarrassing posting on FB in SP9's examination-in-chief when he (SP9) omitted the more elaborate picture as adduced in cross-examination that the deceased uploaded Mugun Then's wife naked photo and when SP9 failed to intervene, the deceased did the same to SP9 and the accused.

[102] On the issue as to whether SP9's evidence is credible as he was drunk having consumed a few bottles of whisky and tins of beer; this court finds that SP9 may have drank a lot but was not too intoxicated so as not to be sober.

SP9: Too intoxicated to know?

[103] On the issue of intoxication of SP9, the Federal Court in *Francis Antonysamy v Public Prosecutor* ventilated it as follows:

> 46. ... On the issue of intoxication there was no scientific evidence placed before me to support the contention of the defence.

47. Having said that he considered the conduct of the accused both before and after the commission of the crime and rejected the defence. In our opinion he was correct in doing so. Scientific evidence to prove intoxication can be provided by an analysis of blood and urine samples which will show the level of alcohol in the body. However, it must be observed that such results are not conclusive to determine the degree of intoxication of a person. As Chao Hick Tin JC said in *Public Prosecutor v Ramasamy a/l Sebastian* [1991] 1 MLJ 75 at p 81:

> In any event, from the evidence of the experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused. Different people react differently to the same blood alcohol level. It makes a great difference whether the person is or is not an experienced drinker. In our judgment, and here we accept the opinion of Dr Chan (PW15), the more reliable indicator of the state of mind of the accused must be the conduct of the accused immediately prior to and after the offence.

48. It must be observed that what is in issue in a defence of intoxication is the state of mind of the person concerned in order to determine whether he could have formed the necessary intention. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level. Needless to say, scientific evidence is significant to explain the conduct of the person. In other words, it will corroborate the evidence of conduct. Its absence cannot therefore be fatal.

[104] Relying on this authority, this court finds that SP9 was not too intoxicated so as not to be able to know what he did and what had happened at Hulu Langat and back to the accused's house in Ampang. SP9 testified that the weapons were disposed of at a damp on their way back to the accused's house in Ampang and clothes worn were disposed of by burning.

[105] SP11 in his witness statement (WS) PSP11 said searched was done at the crime scene to trace the murder weapons but futile. Upon arrest of SP9 and the accused, further search was done at the Semenyih Damp to trace the weapons but failed. This fact further supports the finding by this court that SP9 was not too intoxicated so as not to be aware what had happened on that night.

Whether the injuries are one under s 300 limb (c) of the Penal Code

[106] Limb (c) of s 300 provides as follows:

300 Murder

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) ...;

(b) ...;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

[107] For a charge under this section, the prosecution needs to prove as follows:

(a) the accused has the intention;

(b) the intention is to cause bodily injury; and

(c) the bodily injury in the ordinary cause of nature is sufficient to cause death.

[108] Case laws on this are abundance. In *Hanif bin Mohamad Ali v Pendakwa Raya* [2016] MLJU 1763, the Court of Appeal in discussing s 300 limb (c) in the judgment of Idrus Harun JCA said as follows:

> [19] ... Limb (c) of s 300, in our view, has two requisite elements which must be established by the prosecution before the appellant could be convicted for murder under s 302 of the Penal Code. Firstly, the prosecution has to prove that the bodily injury inflicted by the appellant on the deceased that is 'hypoxic sequelae' due to the compression of the neck was intentional. Secondly, it would be incumbent on the prosecution to also prove that the said injury was sufficient in the ordinary course of nature to cause the deceased's death.
>
> [20] Limb (c) of s 300 does not, in our opinion, require the prosecution to prove that the appellant knew that his act was sufficient in the ordinary course of nature to cause death.
>
> ...
>
> [30] The evidence in connection with the cause of the deceased's death came from the pathologist, PW24. The cause of death according to PW24 was 'hypoxic sequelae to compression of the neck' (sic). In other words, the compression to the neck had given rise to fatal hypoxic sequelae leading to the death of the deceased.
>
> [31] We are mindful that the prosecution relies on s 300(c) of the Penal Code ... In our view, where the prosecution seeks to prove murder under limb (c) of s 300, the prosecution ought to provide proof that the bodily injury intended to be inflicted on the deceased was sufficient in the ordinary course of nature to cause his death. That proof should appropriately be adduced by way of medical evidence of the pathologist who conducted the post mortem examination. Without this evidence, there would be a fatal gap in the prosecution case in that the second essential element of the offence in limb (c) is not established. Reference in this connection may be made to the case of *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2012] 8 CLJ 537 wherein the Federal Court accepted that there was no evidence led from the pathologist as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. In view of the nature of the medical evidence, the Federal Court held that the case would fall within the second part of s 304(a) of the Penal Code.

[109] The Court of Appeal further deliberated as follows:

> [44] The difference between the offence of culpable homicide under section 299 and the offence of murder which falls under s 300(c) of the Penal Code was deliberated in the case of *Public Prosecutor v Megat Shahrizat Megat Shahrur* [2013] 3 MLJ 227; [2011] 5 CLJ 608 in which this court explained such distinction with lucidity and the relevant excerpts are reproduced below —
>
> > [11] s 299 of the Penal Code provides:
> >
> > Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
> >
> > [12] Section 300(c) of the Penal Code provides:
> >
> > Except in the cases hereinafter excepted, culpable homicide is murder:
> >
> > (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;
> >
> > [13] The net effect of the provisions under ss 299 and 300(c) of the Penal Code is that it is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. It is on a comparison of these two limbs of ss 299 and 300 that the decision of doubtful cases must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability (see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; [1976] 1 LNS 159 (FC)). The degree of probability here is the degree of probability of death.
>
> [45] The Federal Court, on appeal, affirmed the decision of this court in the above case stating that the difference between both sections which was thin but detectable lied in the degree of probability or likelihood of causing death so that if death was an imminent result, it fell under section 300 but if death was a likely result, it fell under s 299 (*Public Prosecutor v Megat Shahrizat Megat Shahrur* [2013] 3 MLJ 227; [2011] 8 CLJ 893). To put it simply, if death is a likely result, it is culpable homicide, but if it is the most probable result, it is murder (*Yeap Boon Hai v Public Prosecutor* [2010] 2 MLJ 433; [2010] 2 CLJ 388).

[110] In this present case, the pathologist SP5 has stated in his testimony that the death was a result of 'multiple slash wounds to the head' and this is fatal. SP5 has used the word 'slash' to show the difference in relation to the injuries found on the deceased to be caused by a sharp-edged heavy and rather long object whereas 'stab' wounds to describe injuries caused by icebreaker. The photo shot of the head with this injury showing the slash wounds and the testimonies by SP3 (lorry driver), SP10 (PDRM forensic) and SP11 (IO) that the deceased was dead when found that same morning shows whoever that caused the slash wounds had wanted the probable result that is death.

[111] In P15 post mortem report, under the heading 'Marks of Injury' para (1), SP5 found the slash wounds on the face were cutting through and crushed the facial bones and frontal bone of the skull with protruded crushed brain tissue. The internal examination of the head under 'Brain' found the left side of the brain and inferior aspect of the frontal lobe were crushed. The only conclusion is that with that amount of force against that part of the body, death would be the ultimate result. Based on the totality of evidence, this court finds that the prosecution has proven a prima facie case of murder against the accused under limb (c) of s 300.

Accomplice not charged or made a co-accused

[112] One final point that needs to be addressed is whether the failure on the part of the investigation to recommend SP9 or other suspects to be charged on the relevant crimes that was said to have been committed by them, and the omission on the part of the prosecution to address the same, has caused grave injustice to this case and the accused.

[113] In *R v Roach*, the appellate court acknowledged that accomplice may or may not necessarily be charged as extracted in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329, the Court of Appeal on this point ruled as follows:

> Held (6): The trial judge erred when he held that the unwillingness of the DPP to prosecute the respondent for lodging a 'false' report against the IGP and the first appellant indicated that there was some truth in the report made by the respondent. The unwillingness of the DPP to charge the respondent for making a false report could not be used as a basis to infer that the DPP and the police were trying to cover up the case. The decision to charge or not is clearly within the discretion of the DPP in exercising the powers of the public prosecutor enshrined in art 145(3) of the Constitution and s 376 of the Criminal Procedure Code. Anyone dissatisfied with the public prosecutor's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence, should seek his remedy elsewhere, but not in the courts. The decision of the DPP not to prosecute the case alone without more did not make the investigation carried out by the police on the respondent's police report on the assault 'nothing but a mere sham' (see paras 50 & 53–54); *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC) referred; *Johnson Tan Han Seng v Public Prosecutor*; *Soon Seng Sia Heng v Public Prosecutor*; *Public Prosecutor v Chea Soon Hoong*; *Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (FC) referred.

[114] With that decision in mind, this court finds that the decision to charge or not to charge SP9 is entirely within the discretion of the public prosecutor. The distinction however, is that in the above case a recommendation to charge was made by the enforcement to the public prosecutor, unlike in this present case where there is none.

[115] Be that as it may, if the public prosecutor is minded to charge any of the other suspects and specifically SP9 with a common intention to commit murder under s 34 or of a lesser charge of causing injuries under ss 323 or 326 under the Penal Code, it could have been done so even in the absence of the recommendation by the IO, as the facts are clear and obvious on the roles played by the accused and even SP9.

[116] This court formed the view that the facts are clear and obvious, as the DPP had in no way made any attempt to treat SP9 as hostile or to cross-examine SP9 in any way. This being the case, SP9 would have said the same in his s 112 statement to the police which was then viewed by the DPP in charging the accused alone.

[117] In *Datuk Mohd Zaid bin Ibrahim v Peguam Negara Malaysia* [2017] 9 MLJ 502, relying on the principle in *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114, where the Court of Appeal held:

> that the courts ought to refrain from inquiring into the AG's exercise of discretion under art 145(3) following *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 where it was said:
>
> > A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[118] On accomplice evidence, in *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593, the Court of Appeal formed the view that:

> The need to treat PW9's evidence (an accomplice) with caution is made stronger by the fact that he said that he was not charged as he had agreed to become a witness for the prosecution.

[119] In *Harcharan*'s case, SP9 witnessed the murder and assisted in disposing off the deceased body. The Court of Appeal acquitted the appellant on the basis that the corroboration which was found by the High Court to come from the testimonies of the pathologist SP10, was ruled by the Court of Appeal not to qualify as corroboration. The acquittal was set aside by the Federal Court, on appeal by the public prosecutor (as reflected in *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145 (FC) on a review application under r 137 of the Rules of the Federal Court, the Federal Court decision reversing the acquittal found in *Public Prosecutor v Harcharan Singh a/l Piara Singh & Anor* (Criminal Appeal No 02–22 of 2004(B) (unreported)).

[120] With this in mind, this court would be entitled to assume that the public prosecutor would have decided that no charge is to be made against SP9. Furthermore, the charge against the accused can stand alone as it is not a case where it cannot be ascertained who between the two people (the accused and SP9) who had caused the fatal injuries, similar to the issue that arises in the case of *Mohd Naim bin Ramli* (in *Mohd Naim bin Ramli lwn Pendakwa Raya* [2017] MLJU 886 (COA) agreed with the trial judge's decision that although SP13 (accomplice) was present with the accused person at the crime scene, SP13 was there only with the intention to commit robbery and it was the deceased who committed the murder).

[121] Hence, this court concludes that the prosecution has successfully proven a prima facie case and calls the accused to enter his defence.

DEFENCE CASE

[122] The accused opted to give sworn evidence and called his father SD2 as his witness. The defence's version was that he was invited by SP9 Geva to Geva's house as he was just back from Singapore. The deceased Ganesh was also there and all three of them had their meal there. SP9 and deceased then left to buy alcohol drinks whilst the accused did not follow and left for his home.

[123] The accused went back to SP9's house when he realized he had left his phone charging at SP9's house. The accused told SP9 the accused would be back at SP9's house to get his phone. The accused said he met with SP9's sister Puvaneswari at SP9's house and they chatted for about 30 minutes.

[124] Puvaneswari then received a call from the deceased asking the accused's whereabout. Puvaneswari then gave the phone to the accused. The accused said both SP9 and the deceased pushed the accused to join them at a shop near the Federal Bakery.

[125] At about 1.30am–2am, the accused left to the shop near the Federal Bakery and saw both SP9 and the deceased were consuming alcohol. The accused only had Coke for a drink. All three then left, with the accused heading towards Ampang whilst SP9 and deceased left to purchase more alcohol. SP9 and deceased told the accused they would join him there once they have bought the alcohol drinks. Ten minutes later, SP9 and deceased joined the accused at that location. They started drinking.

[126] According to the accused, he only had two tins of 'Tiger' beer whilst SP9 and deceased consumed beer and whisky. The accused said he observed SP9 acting as if intoxicated. At 3am, SP9 moved the accused and deceased to Hulu

Langat. At about 3.30am, the accused said he received a call from his father SD2 asking where the accused is and why he is still not back home.

[127] The accused said his father would normally check on him if the accused failed to be home after 1am. His father would call him and be certain his son (accused) is back home. The accused left for his home in 5–10 minutes after the call and reached home in 15 minutes. His father SD2 was asleep so the accused had his shower and went to bed. The next morning, the accused went to work and tried to call SP9 but failed.

[128] Two months after the gathering of the accused, SP9 and deceased, the accused got a call from SI Moorthi (police officer) asking the accused to come to the police station. At the enquiry counter of the police station, the accused was then arrested. Only then did the accused see and know that SP9 and family were arrested for the murder of deceased Ganesh.

[129] The accused denied he had any problems with the deceased on Facebook posting. The problem instead, was between SP9 and deceased. When cross-examined, the accused said SP9 never informed him (accused) of any problem relating to Facebook posting. This prompted the DPP to suggest to the accused that what the accused said pertaining the problem on Facebook posting was between SP9 and deceased as not true which was disagreed by the accused.

[130] The accused however, said he knew of the Facebook posting and gave a specific date he came to know of it being on 20 June 2018. The accused said he knew the posting concerned family problems and the accused said he was told of there was problem with the Facebook posting. When cross-examined further by the DPP, the accused said he was unaware of the problem.

[131] The accused called his father as witness SD2. SD2 said on 24 July 2018 early morning, he did call the accused as SD2 was not at his usual spot on the sofa at the living room. SD2 called the accused and asked him where he was and the accused said he was with his friends and will be home in a short while. When cross-examined however, SD2 disagreed that he never called to ask the accused to come back home.

[132] SD2 said he woke up at 5.30am to get his jab for his diabetes and saw the accused lying on the sofa. SD2 went back to sleep after his jab and woke up at about 12 noon–2pm. SD2 said he did not see any sign of burning around his house.

[133] SD2 also said he was not asked by the police to give his statement. SD2 also was unaware if the accused went to work on 24 July 2018. The DPP

challenge this fact that a call was made by SD2 to the accused when the DPP suggested to the accused that nothing was stated in his statement. The accused said he did inform the police.

Deliberation on the defence's case: Evidence of SD2

[134] The critical issue to suggest that the accused was not the person who committed the murder can be answered by showing that the accused was not at the crime scene hence he could not have committed the murder. The prosecution in his submission directed this court's attention to the fact that SD2's evidence amounts to an alibi defence which should be disregarded as no notice of alibi was given by the defence.

[135] Section 402A of the CPC states:

> (1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.
>
> (2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.
>
> (3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at anytime during the trial subject to the following conditions:
>
> (a) the accused has given a written notice of the alibi to the public prosecutor; and
>
> (b) the public prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

[136] The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[137] In *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49, a unanimous decision by the Federal Court in the judgment by Richard Malanjum CJ (Sabah and Sarawak), laid out the principle on defence of alibi as follows:

> [92] Now, the following legal principles on the defence of alibi are relevant in the present namely:
>
> (a) the defense of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see *Regina v Youssef* (1990) 50 A Crim R1 at pp 2 [96] 3);
>
> (b) ...

[138] Clearly, the evidence of SD2 was aimed with the purpose of showing that the accused was elsewhere at the time the offence was said to have been committed and this requires an alibi notice to be given. The absence of the statutory notice, means the evidence of SD2 that he saw the accused on the sofa in his house should be expunged.

[139] With that evidence expunged, what is left is that there was a call made by SD2 to the accused. This very important fact relied by the accused was suggested by the DPP to the accused, to never be part of the accused statement to the police. The statement, however was never intended by the prosecution to be tendered as it would against s 113 of the CPC:

> Section 113 Admission of statements in evidence.
>
> (1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.
>
> (2) When any witness is called for the prosecution or for the defence, other than the accused, the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].
>
> (3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.
>
> (4) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within section 27 or paragraph 32(1)(a), (i) and (j) of the Evidence Act 1950.
>
> (5) When any person is charged with any offence in relation to —
>
> (a) the making; or
>
> (b) the contents, of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution's case.

The accused denied and said he told the police of his father. In re-examination, the defence did not ask anything about the accused disclosing this defence to the police that the accused's father called him and thus the accused made his way back home.

[140] To remedy this, the accused was asked if he had any proof that there was phone call between the accused and SD2. The accused said the phone would reflect the call but unfortunately due to passage of time, the accused was unable

to unlock his phone as he had forgotten the key log (or 'pattern' as used by the accused) to access it. Nothing was asked in re-examination if the accused had given this important fact to the police.

[141] The father SD2 in cross-examination when asked about the call log of his phone-call to the accused said he knew nothing of the call log as he did not know how to handle his phone.

FINDING BY THIS COURT CLOSE OF DEFENCE

[142] Both the accused and father SD2 knew the importance of the call as it would be able to place the accused away from the crime scene. The father's evidence that he saw the accused at home at 5.30am would also be relevant to the charge to show that the accused was elsewhere during the time frame that was captured in the charge, the murder was said to happen between 12.30am to 6.05am on 24 July 2018. However, this important fact of the phone call between SD2 and accused and SD2 saw the accused at home, was never put to the investigating officer SP11.

[143] This material omission leaves this court with no option but to conclude that the call never happened. With the alibi evidence expunged, the only defence of the accused was a denial that he never committed the murder. This does not answer the pathologist evidence SP5 which found the injuries on the deceased were of different sizes that led him to conclude the possibility that more than one weapon being used and the deceased being attacked by more than one assailant.

[144] With Geva (SP9) who the prosecution never disputed to have also injured the deceased and hence an accomplice but needed to be called as prosecution witness as he played no role in causing the fatal injuries that led to the death of the deceased, the elimination process having been exercised by this court leaves only the accused at the scene. More so the accused's DNA on a cigarette butt was found at the scene but no explanation was given by the accused in his evidence.

[145] A few names arose from the defence evidence as suggested to the prosecution witnesses, but they were not critical neither to the unfolding of the prosecution case nor to raise a reasonable doubt. Based on the totality of evidence, this court concluded that the prosecution had succeeded in proving a case beyond reasonable doubt that the accused had murdered the victim as per the charge proffered against the accused with the defence having failed to raise a reasonable doubt on the evidence as adduced and found by this court. The accused was found guilty and convicted and sentenced to death by hanging.

Accused convicted and sentenced to death by hanging.

Reported by Nabilah Syahida Abdullah Salleh